

**The Oregon Administrative Rules contain OARs filed through February  
15, 2005**

**BUREAU OF LABOR AND INDUSTRIES**

**DIVISION 9**

**OREGON FAMILY LEAVE ACT**

**839-009-0200**

**Purpose and Scope**

(1) The Civil Rights Division of the Bureau of Labor and Industries enforces the Oregon Family Leave Act (OFLA), ORS 659A.150 to 659A.186, which provides for OFLA leave and prohibits discrimination against employees using OFLA leave. These rules implement and interpret the Oregon Family Leave Act.

(2) These rules apply to complaints and inquiries received under ORS 659A.150 to 659A.186 and under these rules.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - ORS 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

**839-009-0210**

**Definitions**

(1) "Alternate duty" means work assigned to an employee that may consist of:

(a) The employee's same duties worked on a different schedule; or

(b) Different duties worked on the same or different schedule.

(2) "Child," for the purposes of parental and sick child leave only (not for the purposes of serious health condition leave), means a biological, adopted, foster or stepchild, the child of an employee's same sex-domestic partner or a child with whom the employee is or was in a relationship of in loco parentis. The child must be:

(a) Under the age of 18; or

(b) An adult dependent child substantially limited by a physical or mental impairment as defined by ORS 659A.100(2)(d).

(3) "Covered employer" means any employer employing 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar work weeks in the calendar year in which the leave is to be taken or in the calendar year immediately preceding the year in which the leave is to be taken.

(4) "Eligible employee" means an employee employed in the State of Oregon on the date OFLA leave begins.

(a) For the purpose of taking parental leave, an employee must be employed by a covered employer for at least 180 calendar days immediately preceding the date on which OFLA leave begins.

(b) For purposes of taking all other types of OFLA leave, including pregnancy disability leave, an employee must be employed by a covered employer for an average of at least 25 hours per week during the 180 calendar days immediately preceding the date OFLA leave begins.

(A) In determining that an employee has been employed for the preceding 180 calendar days, the employer must count the number of days an employee is maintained on the payroll, including all time paid or unpaid. If an employee continues to be employed by a successor in interest to the original employer, the number of days worked are counted as continuous employment by a single employer.

(B) In determining 25 hours average per week, the employer must count actual hours worked using guidelines set out pursuant to the Fair Labor Standards Act (See 29 CFR Part 785).

(c) For the purpose of qualifying as an eligible employee, the employee need not work solely in the State of Oregon.

(5) "Family member" means the spouse, same-sex domestic partner, custodial parent, non-custodial parent, adoptive parent, foster parent, biological parent, parent-in-law, parent of same-sex domestic partner or a person with whom the employee is or was in a relationship of in loco parentis. It also includes the biological, adopted, foster or stepchild of an employee or the child of an employee's same-sex domestic partner. For the purposes of OFLA, an employee's child in any of these categories may be either a minor or an adult at the time serious health condition leave is taken.

(6) "FMLA" is the federal Family and Medical Leave Act, 29 USC 2601.

(7) "Foster child" means a child, not adopted, but being reared as a result of legal process, by a person other than the child's natural parent.

(8) "Health care provider" means:

(a) The person primarily responsible for providing health care to an eligible employee or to a family member of an eligible employee: and

(b) Who is a physician licensed to practice medicine or surgery, including a doctor of osteopathy; or

(c) A podiatrist, a dentist, a clinical psychologist, an optometrist, a naturopath, a nurse practitioner, a licensed physician's assistant, a direct entry midwife, a nurse-midwife or a clinical social worker authorized to practice and perform within the scope of a professional license as provided by law; or

(d) A Christian Science practitioner listed with the First Church of Christ Scientist in Boston, Mass: or

(e) A chiropractor, but only to the extent that a chiropractor provides treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated to exist by X-rays.

(9) "In loco parentis" means in the place of a parent, having financial and day-to-day responsibility for the care of a child. A legal or biological relationship is not required.

(10) "Intermittent leave" means leave taken in multiple blocks of time and/or requiring an altered or reduced work schedule.

(11) "OFLA" is the Oregon Family Leave Act, ORS 659A.150 to 659A.186.

(12) "OFLA leave" means a leave of absence for purposes described in ORS 659A.159 and OAR 839-009-0230 (1) through (4).

(13) "OFLA leave year," for calculating the OFLA leave year entitlement, means a calendar year (January to December), a fixed 12-month period such as a fiscal year, a 12-month period measured forward from the date of the employee's first OFLA leave, or a 12-month period measured backward from the date the employee uses any OFLA leave. The option selected must be applied to all employees. In the absence of an employer policy or collective bargaining agreement defining how an OFLA leave year will be measured, a calendar year will be used.

(14) "Serious health condition" means an illness, injury, impairment or physical or mental condition of an employee or family member:

(a) That requires inpatient care in a medical care facility such as a hospital, hospice or residential facility such as a nursing home. When a family member resides in a long-term residential care facility, leave applies only to:

(A) Transition periods spent moving the family member from one home or facility to another, including time to make arrangements for such transitions;

(B) Transportation or other assistance required for a family member to obtain care from a physician; or

(C) Serious health conditions as described in (b) through (h) of section 14 of this rule.

(b) That the treating health care provider judges to pose an imminent danger of death, or that is terminal in prognosis with a reasonable possibility of death in the near future;

(c) That requires constant or continuing care such as home care administered by a health care professional;

(d) That involves a period of incapacity. Incapacity is the inability to perform at least one essential job function, or to attend school or perform regular daily activities for more than three consecutive calendar days and any subsequent required treatment or recovery period relating to the same condition. This incapacity must involve:

(A) Two or more treatments by a health care provider; or

(B) One treatment plus a regimen of continuing care.

(e) That results in a period of incapacity or treatment for a chronic serious health condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity, such as asthma, diabetes or epilepsy;

(f) That involves permanent or long-term incapacity due to a condition for which treatment may not be effective, such as Alzheimer's disease, a severe stroke or terminal stages of a disease. The employee or family member must be under the continuing care of a health care provider, but need not be receiving active treatment;

(g) That involves multiple treatments for restorative surgery or for a condition such as chemotherapy for cancer, physical therapy for arthritis, or dialysis for kidney disease that if not treated would likely result in incapacity of more than three days; or

(h) That involves any period of disability of a female due to pregnancy or childbirth or period of absence for prenatal care.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - ORS 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

### **839-009-0220**

#### **Relationship of OFLA to FMLA**

(1) Leave taken under FMLA will count as OFLA leave provided the employee is also eligible for OFLA leave.

(2) Provisions of OFLA will be construed to the extent possible in a manner that is consistent with any similar provisions of FMLA.

(3) Employers subject to both OFLA and FMLA must apply the regulation that is more beneficial to the individual employee's circumstances.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - ORS 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

### **839-009-0230**

#### **Purposes for Taking OFLA Leave**

Eligible employees may take OFLA leave for the purposes commonly referred to as parental leave, serious health condition leave, pregnancy disability leave and sick child leave.

(1) Parental leave is leave taken to care for the employee's newborn, newly adopted or newly placed foster child under 18 years of age or for a newly adopted or newly placed foster child 18 years of age or older who is incapable of self care because of a physical or mental impairment. It includes leave time to effectuate the legal process required for placement of a foster child or the adoption of a child.

(2) Serious health condition leave is leave taken:

(a) To provide care for a family member with a serious health condition as defined in 839-009-0210(14); or

(b) To recover from or seek treatment for a serious health condition that renders an employee unable to perform at least one essential function of the employee's regular position.

(3) Pregnancy disability leave is leave taken by a female employee for a disability related to pregnancy or childbirth, occurring before or after the birth of the child, or for prenatal care. Pregnancy disability leave is a form of serious health condition leave.

***(4) Sick child leave is leave taken to care for an employee's child suffering from an illness or injury that requires home care but is not a serious health condition. An employer is not required to grant leave for routine medical or dental appointments.***

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - ORS 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

### **839-009-0240**

#### **Length of Leave and Other Conditions**

(1) An eligible employee is entitled to as much as 12 weeks of OFLA leave in any one-year period except that:

(a) A female employee may take up to 12 weeks of pregnancy disability leave in addition to 12 weeks of OFLA leave for any leave purpose;

(b) An employee taking the entire 12 weeks of OFLA leave for parental leave may take an additional 12 weeks of sick child leave within the same leave year. If the employee uses less than 12 weeks of parental leave, however, no additional sick child leave is available, except for the balance of the initial 12 weeks. The employee may also use this balance for any other OFLA leave purpose.

(2) A female employee may take up to 36 weeks of OFLA leave in one leave year. The 36 weeks of OFLA leave may be taken, for example, under the following circumstances:

(a) The female employee takes 12 weeks of pregnancy disability leave, followed by;

(b) Twelve weeks of parental leave, followed by;

(c) Twelve weeks of sick child leave.

(3) A male employee may take up to 24 weeks of OFLA leave in one leave year, but only under the following circumstances:

(a) The male employee takes 12 weeks of parental leave, followed by:

(b) Twelve weeks of sick child leave.

(4) When two family members work for the same covered employer, both employees may take OFLA leave at the same time only under the following circumstances:

(a) One employee needs to care for the other employee suffering from a serious health condition; or

(b) One employee needs to care for a child suffering from a serious health condition while the other employee is also suffering from a serious health condition; or

(c) Both family members are suffering from a serious health condition; or

(d) The employer allows concurrent leave.

(5) Parental leave must be taken in one uninterrupted period -- unless the employer approves otherwise -- and must be completed within 12 months of the birth, adoption or placement of the child. An exception must be made to allow parental leave to effectuate adoption or foster placement of the child. Such leave need not be taken in one, uninterrupted period with any additional parental leave.

(6) The birth, adoption or foster placement of multiple children at one time entitles the employee to take only one 12-week period of parental leave.

(7) Sick child leave need not be provided to an eligible employee by a covered employer if another family member, including a non-custodial biological parent, is willing and able to care for the child.

(8) For the purpose of intermittent leave, OFLA leave entitlement is calculated for an employee by multiplying the number of hours the employee normally works per week by 12. (For example, an employee normally employed to work 30 hours per week is entitled to 12 times 30 hours, or a total of 360 hours OFLA leave.)

(a) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks worked prior to the beginning of the leave period must be used for calculating the employee's normal work week. (For example, an employee working an average of 25 hours per week is entitled to 12 times 25 hours, or a total of 300 hours OFLA leave.)

(b) If an employee takes intermittent or reduced work schedule OFLA leave, only the actual number of hours of leave taken may be counted toward the 12 weeks of OFLA leave to which the employee is entitled.

(9) An employee who has previously qualified for and taken some portion of OFLA leave must requalify as an "eligible employee" as defined in 839-009-0210(4) each time the employee begins additional OFLA leave within the same leave year. Exceptions:

(a) An employee who has been granted OFLA leave for a qualifying serious health condition of the employee or family member need not requalify under OAR 839-009-0210(4) each time leave for the same purpose (the same individual and the same serious health condition) is taken.

(b) A female employee who has been granted OFLA pregnancy disability leave need not requalify under OAR 839-009-0210(4) for an additional 12 weeks of leave within the same leave year for any OFLA leave purpose.

(c) An employee who has taken 12 weeks of OFLA parental leave, need not requalify under OAR 839-009-0210(4) for up to an additional 12 weeks of leave within the same leave year when used for the purposes of OFLA sick child leave.

(10) An exempt employee is a salaried executive, administrative or professional employee under the federal Fair Labor Standards Act (see 29 CFR Part 541 through 541.315) or the state minimum wage and overtime laws (ORS chapters 652 and 653).

(a) When OFLA leave is also covered by FMLA and the employee takes intermittent leave in blocks of less than one day, the employer may reduce the employee's salary for the part-day absence without the loss of the employee's exempt status in accordance with OAR 839-020-0004(30)(a).

(b) When OFLA leave is not covered by FMLA (e.g., the employer has 25 to 49 employees, the leave is taken for a sick child, for the serious health condition of a parent-in-law, for the serious health condition of a same-sex domestic partner or for the serious health condition of a same-sex domestic partner's parents), and the employee takes intermittent leave in blocks of less than one day, an employer will jeopardize the employee's exempt status if the employer reduces the employee's salary for the part-day absence.

(11) The requirements of OFLA do not apply to any employer offering eligible employees a nondiscriminatory cafeteria plan, as defined by section 125 of the Internal Revenue Code of 1986, that provides as one of its options employee leave at least as generous as the leave required by OFLA.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 3-2005, f. 1-6-05, cert. ef. 1-7-05

## **839-009-0245**

### **Intermittent Leave and Alternate Duty**

(1) An employer may transfer an employee on intermittent OFLA leave or a reduced work schedule into an alternate position with the same or different duties to accommodate the leave, provided the following exist:

- (a) The employee accepts the transfer position voluntarily and without coercion;
- (b) The transfer is temporary, lasts no longer than necessary to accommodate the leave and has equivalent pay and benefits;
- (c) The transfer is compliant with applicable collective bargaining agreements, as well as with state and federal law, providing all the employee protections found in FMLA regulations 29 CFR Part 825;
- (d) Transfer to an alternate position is used only when there is no other reasonable option available that would allow the employee to use intermittent leave or reduced work schedule; and
- (e) The transfer is not used to discourage the employee from taking intermittent or reduced work schedule leave, or to create a hardship for the employee.

(2) An employee transferred, as provided in section (1)(a) through (e) of this rule, to an alternate position for the purpose of a reduced work schedule must be returned to the employee's former position when the employee notifies the employer that the employee is ready to return to the former position at the end of the alternate duty leave.

(3) OFLA leave time for an employee on intermittent leave or a reduced work schedule is the difference between the number of hours the employee normally works and the number of hours the employee actually works during the intermittent leave or reduced work schedule.

(4) Holidays or days in which the employer's business is not in operation are not counted toward intermittent or reduced work schedule OFLA leave.

(5) An employer may transfer an employee recovering from a serious health condition to an alternate position that accommodates the serious health condition provided:

- (a) The employee accepts the position voluntarily and without coercion;
- (b) The transfer is temporary, lasts no longer than necessary and has equivalent pay and benefits;
- (c) The transfer is compliant with applicable collective bargaining agreements, as well as with state and federal law, providing all the employee protections found in FMLA regulations 29 CFR Part 825; and

(d) The transfer is not used to discourage the employee from taking OFLA leave for a serious health condition, or to create a hardship for the employee.

(6) An employee is not on OFLA leave if the employee has been transferred -- as provided in section (5)(a) through (d) of this rule -- to an alternate position for the purpose of alternate work duties that the employee is able to perform within the limitations of the employee's own serious health condition, but not requiring a reduced work week. An employee working in an alternate position retains the right to return to the employee's original position unless all OFLA leave taken in that leave year plus the period of time worked in the alternate position exceed 12 weeks.

(7) An alternate position accommodating an employee's serious health condition may result in the employee working fewer hours than the employee worked in the original position. The employee's OFLA leave is the difference between the number of hours the employee worked in the original position and the number of hours the employee actually works in the alternate position.

(8) Intermittent leave for school teachers is subject to the special rules in OAR 839-009-0290.

Stat. Auth.: ORS 659A.805 & ORS 659A.162

Stats. Implemented: ORS 659A.150 - ORS 659A.186

Hist.: BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

## **839-009-0250**

### **Notice by Employee; Designation by Employer**

(1) Except in situations described in sections (2) and (3) of this rule, a covered employer may require an eligible employee to give 30 days written notice, including an explanation of the need for leave, before starting OFLA leave. The employee is not required to specify that the request is for OFLA leave.

(a) An employee able to give advance notice of the need to take OFLA leave must follow the employer's known, reasonable and customary procedures for requesting any kind of leave.

(b) An employer may request additional information to determine that a requested leave qualifies for designation as OFLA leave, except in cases of parental leave (no medical certification required) or sick child leave (no medical verification may be required until after three occurrences).

(c) The employer may provisionally designate an absence as OFLA leave until sufficient information is received to make a determination.

(2) When an employee is unable to give the employer 30 days notice, the employee is encouraged to give the employer as much advance notice as is practicable.

(3) When taking OFLA leave in an unanticipated or emergency situation, an employee must give verbal or written notice within 24 hours of commencement of the leave. This notice may be given by any other person on behalf of an employee taking unanticipated OFLA leave. The employer may require written notice by the employee within three days of the employee's return to work.

(4) If an employee fails to give notice as required by sections (1), (2), and (3) of this rule or the employer's policies, the employer may reduce the period of unused OFLA leave by up to three weeks in that one-year leave period.

(a) The employee may also be subject to disciplinary action under an employer's uniformly applied policy or practice. This practice must be consistent with the employer's discipline for similar violations of comparable rules.

(b) An employer may not reduce an employee's available OFLA leave or take disciplinary action unless the employer has posted the required Bureau of Labor and Industries Family Leave Act

notice or the employer can otherwise establish that the employee had actual knowledge of the notice requirement.

(c) Federal regulations prohibit reducing the leave period under FMLA, but allow an employer to delay the start of leave because of improper notice (see 29 CFR § 825.304).

(d) When an employee is subject to both FMLA and OFLA, the employer must apply the discipline available under (4)(a) or (c) of this rule that is most beneficial to the employee's individual circumstances.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - ORS 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

**839-009-0260**

### **Medical Verification and Scheduling of Treatment**

(1) When an employee gives 30 days notice for OFLA leave, other than for parental leave, the employer may require the employee to provide medical verification of the need for OFLA leave [need] before the leave starts. Consistent with ORS 659A.306, the employer must pay the cost of the medical verification not covered by insurance or other benefit plan.

(2) If an employee's need for OFLA leave precludes giving 30 days notice, the employee must provide medical verification within 15 days of the employer's request for verification.

(3) The employer must provide the employee with written notice of any requirement to provide medical verification of the need for leave and the consequences for failure to do so.

(4) An employer may not delay the taking of an OFLA leave in the event that medical verification is not received prior to the commencement of (a) leave taken (under section (1) or (2) of this rule.) for unforeseen circumstances. The employer may designate the leave as provisionally approved subject to medical verification.

(5) If an employee submits medical verification signed by the health care provider, the employer may not directly request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical verification. If an employee is on OFLA or FMLA leave running concurrently with a worker's compensation absence, the employer may consult the worker's attending physician in a manner that is consistent with the worker's compensation regulations.

(6) An employer may not request subsequent medical verifications more often than every 30 days and only in connection with an absence by the employee except as stated in the FMLA regulations (see 29 CFR 825.308), including, for example, when:

(a) Circumstances described by the previous medical verification have changed significantly (e.g., the duration or frequency of absences, the severity of conditions, complications); or

(b) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(7) If an employee requests OFLA leave because of the employee's own serious health condition, the employer may require the employee to obtain the opinion of a second health care provider, designated by the employer, at the employer's expense. If the opinion of the second provider conflicts with the medical verification provided by the employee, the employer may require the two providers to designate a third health care provider to provide an opinion at the employer's expense. The opinion of the third provider is binding on both the employer and the employee. Before restoring the employee to work after taking OFLA leave for the employee's own serious health condition, the employer may require the employee to present certification from the employee's health care provider that the employee is able to resume work. The employer may not require the employee to obtain a second opinion.

(8) If an employee has taken sick child leave on all or any part of three separate days during a leave year, the employer may, at its discretion, require medical verification on the fourth day or subsequent occurrence of sick child leave within that leave year. The employer must pay the cost of the verification not covered by insurance or other benefit plan. The opinion of the health care provider is binding. The employer may not require the employee to obtain a second opinion.

(9) Where possible an employee must make a reasonable effort to schedule medical treatment or supervision at times that will minimize disruption of the employer's operation.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 3-2005, f. 1-6-05, cert. ef. 1-7-05

### **839-009-0270**

#### **Job Protection**

(1) An employer must restore an employee returning from OFLA leave, including intermittent and alternative duty leave, to the employee's former position if the job still exists, even if it has been filled during the employee's OFLA leave. The former position is the position held by the employee at the time OFLA leave began, regardless of whether the job has been renamed or reclassified. (For example, a delivery driver must be returned to the same route, at the same rate of pay and benefits, driving the same truck, delivering the same goods, on the same shift and working from the same location as when the driver started OFLA leave.)

(2) Any worker hired during an eligible employee's leave to perform the same work that the eligible employee performed before the leave was taken is a replacement worker. When the eligible employee notifies the employer that the employee is ready to return to work, the employer must give that employee the opportunity to work any hours that the replacement worker would otherwise have been scheduled to work.

(3) The employee is not entitled to return to the former position if the employee would have been bumped even were OFLA not taken.

(4) If the position held by the employee at the time OFLA leave began has in fact been eliminated and not merely renamed or reclassified, the employer must restore the employee to any available, equivalent position.

(a) An available position is a position that is vacant or not permanently filled.

(b) An equivalent position is a position that is the same as the former position in as many aspects as possible. If an equivalent position is not available at the employee's former job

site, the employee may be restored to an equivalent position within 20 miles of the former job site.

(5) Unless the terms of a collective bargaining agreement, other agreement or the employer's policy provide otherwise:

(a) An employee on OFLA leave does not accrue seniority, production bonuses or other benefits that would accrue while the employee is working;

(b) An employee has no greater right to a job or other employment benefits than if the employee had not taken OFLA leave; and

(c) An employee is subject to layoff the same as similarly situated employees not taking OFLA leave.

(6) Except for benefits used while on OFLA leave, benefits an employee was entitled to prior to starting OFLA leave must be restored in full upon the employee's return to work. The benefits do not have to be restored, however, if such benefits have been eliminated or changed for similarly situated employees. (For example, an employer's medical insurance requires a three-month waiting period for health insurance coverage. An employee works seven months, takes OFLA leave for 12 weeks and returns to work with health problems. The employee must be covered immediately at the same level of coverage, with the same benefits as before the commencement of the OFLA leave.) This applies to all benefit provisions.

(a) An employer electing to continue health or other insurance coverage for an employee on OFLA leave may require that the employee pay only the same share of health or other insurance premium during the leave that the employee paid prior to the leave.

(b) If an employee cannot or will not pay such costs, the employer may elect to discontinue benefit coverage, unless to do so would render the employer unable to restore the employee to full benefit coverage as required in section (6) of this rule.

(c) If an employer pays any portion of any employee's benefit coverage for employees on non-OFLA leave, the employer must pay that portion during OFLA leave.

(d) If the employer pays (directly or indirectly, voluntarily or as required by state or federal statute) any part of the employee's share of health or other insurance premium while an employee is on OFLA leave, the employer may deduct up to 10 percent of the employee's gross pay each pay period after the employee returns to work until the amount is repaid.

(e) If an employee fails to return to work -- unless the failure to return to work is because of a serious health condition for which the employee would be entitled to OFLA leave or another circumstance beyond the employee's control -- the employer may recover the employee's share of benefits paid by the employer. The employer may use any legal

means to collect the amount owed for the employee's share of benefits paid by the employer, including deducting the amount from the employee's final paycheck.

(7) An employer may require an employee to follow the employer's established leave policy regarding periodic reporting to the employer of the employee's current status. Before restoring the employee to work after taking OFLA leave for the employee's own serious health condition, the employer may require the employee to present certification from the employee's health care provider that the employee is able to resume work. Pursuant to ORS 659A.306, the employer is responsible for any co-pay or other out-of-pocket costs incurred by the employee in providing the certification. The employer may not require the employee to obtain a second opinion.

(8) If an employee gives unequivocal notice of intent not to return to work from OFLA leave:

(a) The employee is entitled to complete the approved OFLA leave, providing that the original need for OFLA leave still exists. The employee remains entitled to all the rights and protections under OFLA, including but not limited to, the use of vacation, sick leave and health benefits pursuant to OAR 839-009-0270 and 839-009-0280, except;

(b) The employer's obligations under OFLA to restore the employee's position and to restore benefits upon the completion of leave cease, except as required by COBRA; and

(c) The employer is not required to hold a position vacant or available for the employee giving unequivocal notice of intent not to return.

(9) An employer may not use the provisions of this section as a subterfuge to avoid the employer's responsibilities under OFLA.

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### **839-009-0280**

#### **Use of Paid Leave**

(1) OFLA leave is unpaid leave except that an employee may use accrued paid vacation leave during OFLA leave, or an employer may require the use of accrued paid leave during OFLA leave, as follows:

(a) An employee may use, or an employer may require the employee to use, accrued vacation or personal leave during OFLA leave;

(b) An employee may use, or an employer may require the employee to use, accrued sick leave during OFLA leave if to do so is consistent with a collective bargaining agreement or the employer's sick leave policy. (For example, if an employee is entitled to take sick leave for the illness of a family member, then the employer must allow, or may require, the employee to use accrued sick leave during OFLA leave for the serious health condition of a family member.)

(c) An employee taking parental leave may use, or the employer may require the employee to use, accrued vacation, personal and sick leave. The employer may not deny the use of accrued sick leave to an employee for the purpose of parental leave, regardless of the employer's regular policy except for the provisions in section (2) of this rule.

(d) As used in subsections (b) and (c) of section (1), accrued sick leave does not include disability insurance or disability benefits.

(2) Notwithstanding the provisions of section (1) of this rule and subject to the terms of a collective bargaining agreement or other written employment agreement, an employer may require an employee to use paid leave during OFLA leave, if available, and may determine the order in which paid leave is to be used if more than one type of leave is available. The employer may exercise these prerogatives only if:

(a) The employer provides written notice to the employee that accrued paid leave is to be used during OFLA leave, prior to the commencement of OFLA leave; or

(b) The employer provides written notice to the employee within two business days of the employee's notice of unanticipated or emergency leave that the employee will be required to use accrued paid leave.

(3) Either the employee or the employer may choose to have an employee's OFLA leave run concurrently with a Workers' Compensation absence or with other paid or unpaid leave provided under the employer's policy.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - ORS 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

## **839-009-0290**

### **Special Rules for Public School Teachers**

(1) The provisions of this section apply only to employees of a school district, employed principally as instructors in public kindergartens, elementary schools, secondary schools or education service districts.

(2) If a public school teacher requests, in advance, OFLA leave for a serious health condition, and the teacher will be absent more than 20 percent of the time, the employer may require the teacher to elect one of the following options:

(a) To take OFLA leave for one uninterrupted period of time to complete medical treatment. (School holidays and school vacation days are not counted as OFLA leave); or

(b) To transfer temporarily into an available alternative position that better accommodates periodic absences.

(3) If a teacher begins OFLA leave more than five weeks before the end of the academic term because of the teacher's own serious health condition, the employer may require the teacher to remain on leave until the end of the term if:

(a) The OFLA leave is at least three weeks long; and

(b) The teacher's return to work would occur within three weeks of the end of the term.

(4) If a teacher begins OFLA leave within five weeks of the end of the academic term for parental leave or the serious health condition of a family member, the employer may require the teacher to remain on OFLA leave through the end of the term if:

(a) The leave is at least two weeks long; and

(b) The teacher's return would occur within the last two weeks of the term.

(5) If a teacher begins OFLA leave within three weeks of the end of the academic term for parental leave or to care for a family member with a serious health condition and the leave is greater than five working days, the employer may require the teacher to remain on family leave until the end of the term.

(6) If a teacher takes OFLA leave to the end of the school year and continues the leave at the beginning of the next school term, the leave is consecutive rather than intermittent leave.

(a) The period between the end of the school term and the beginning of the next school term, when a teacher would not have been required to report for duty, is not counted against the teacher's OFLA leave entitlement.

(b) A teacher on OFLA leave at the end of the school term must be provided with the same benefits during the period between school terms that the teacher would normally receive if no OFLA leave were taken.

(7) If a teacher is required by the employer to remain on leave to the end of the academic term, only the period of leave the teacher requested can be charged against the teacher's OFLA leave entitlement.

(8) Nothing in these rules prohibits the employer from allowing the teacher to work as a substitute or in some other paid capacity during the weeks prior to the end of term under subsection (4) or (5) of this rule.

(9) Full-time employees covered by this rule, and who have been maintained on the payroll by a school district during 180 consecutive calendar days, are thereafter deemed to have been employed by that school district for an average of at least 25 hours per week during the 180 days immediately preceding the date any OFLA leave begins.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - ORS 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

### **839-009-0300**

#### **Postings**

Each covered employer must display the Bureau of Labor and Industries Family Leave Act notice. The notice must be displayed in each building or worksite in an area that is accessible to and regularly frequented by employees. Failure to post the Family Leave Act notice is an unlawful employment practice as provided in ORS 659A.001(12).

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - ORS 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

### **839-009-0320**

#### **Enforcement and Retaliation**

(1) An employer's duties and obligations under OFLA extend to a successor employer as defined in 29 CFR 825.107.

(2) In accordance with the provisions of OFLA an eligible employee claiming a violation of the OFLA may file a complaint with the Civil Rights Division of the Bureau of Labor and Industries in the manner provided by ORS 659A.820.

(3) It is an unlawful employment practice for an employer to retaliate or in any way discriminate against any person with respect to hiring, tenure or any other term or condition of employment because the person has inquired about OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act.

(4) Pursuant to ORS 659A.030(1)(f), it is an unlawful employment practice for an employer to discharge, expel or otherwise discriminate against any person because the

person has filed a complaint, testified or assisted in any proceeding in connection with the Oregon Family Leave Act.

(5) Pursuant to ORS 659A.030(1)(g), it is an unlawful employment practice for any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts in violation of the Oregon Family Leave Act or to attempt to do so.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.150 - ORS 659A.186

Hist.: BL 2-1995, f. 9-8-95, cert. ef. 9-9-95; BLI 5-2000, f. & cert. ef. 2-1-00; BLI 10-2002, f. & cert. ef. 5-17-02

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